EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 85-6004 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPENDIX TO MOTION TO DISMISS

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067
COUNSEL FOR APPELLEE

29 pp

IN THE DIS .ICT COURT OF APPEAL OF T. S.ATE OF FLORIDA
FIFTH DISTRICT

BRET CLARK

Petitioner,

v.

STATE OF FLORIDA

Respondent.

CASE NO. 85-237

DATE: March 12, 1985

BY ORDER OF THE COURT:

ORDERED that Respondent, State of Florida, shall file with this Court and show cause, within twenty days from the date hereof, why the PETITION FOR WRIT OF CERTIORARI, filed February 14, 1985, should not be granted.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach (with copy of Petition)
Bret Clark, pro se
State Attorney's Office, 5th JC

A-1

IN TH .TH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Bret Clark,
Petitioner,
v.

State of Florida,
Respondent.

Case No.

PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

Petitioner herewith files this petition for writ of certiorari and alleges as follows (see, Fla. R. App. P. 9.100(e)):

(1) Basis of Jurisdiction

The Court has jurisdiction of this action to review a final order of the above-named court acting in its review capacity. Fla. R. App. P. 9.030 (b)(2)(B). As appears more fully below, the circuit court entered an order affirming a decision of the Lake County Court. Appellant first learned of this order on January 14, 1985, after his license had already been suspended (the Lake County Court convicted Petitioner of a traffic offense). see, Appendix at A2.

At this writing, Petitioner has not as yet determined if or when the order sought to be reviewed in this Court became "rendered" for purposes of marking the time within which the instant petition had to be filed. see, Fla. R. App. P. 9.020(g). Although ordinarily a petition not filed within the prescribed time prevents the court from taking jurisdiction, an exception to this rule permits the Court to exercise jurisdiction herein (the filing date of the order to be reviewed is not apparent from any stamp on its face, but Petitioner presumes it was recorded shortly thereafter). see, Appendix at A1. In certain circumstances, full appellate review will be afforded when to do otherwise would so deny fundamental fairness as to rise to a denial of due process. Hollingshead v. Wainwright 194 So. 2d 577 (Fla 1967); State ex rel. Ervin v. v. Smith 160 So. 2d 518 (Fla. 1964).

In the case at bar, Petitioner was denied the benefits of the notice provisions built into the statutory scheme designed to inform motorists of proceedings involving traffic citations. see, Appendix at A3. This scheme, and

A-2

the interpretatic n its application in Addleman veal the legislative intent that the inherent difficulties of keeping a transitory class of litigants be ameliorated by notifying motorists using registered mail when the process of license suspension is initiated. In Petitioner's situation, had he been informed in this manner prescribed by law, he would have been in a position to take action before the effective date of his suspension in addition to being placed on notice of the decision affirming his conviction. see, Appendix at A4, A5 and A7.

Petitioner submits that the importance of notifying a motorist that the time to take an appeal has begun to run is at least equal to that of notifying him that the process of suspension has been initiated. In any event, the misconduct causing Petitioner to not be notified of the order entered in his case until 4 months after its issuance allows the Court to exercise jurisdiction in this action because the desire to seek full appellate review has been frustrated by state action. see, Leggett v. Wainwright 297 So. 2d 605 (1st D.C.A. 1974), in which the court applied Hollingshead, supra. Accordingly, this Court has jurisdiction hereof.

(2) Facts

Petitioner was cited for speeding on the Florida Turnpike on August 12, 1982. The trooper used a radar detection device for this arrest, but when Petitioner attempted to confirm the readout, it was blank. The officer explained that it was standard policy not to lock the digital display when deciding to issue a citation. When Petitioner began to protest his innocence, the trooper stated that any attempt to contest his fine would place Petitioner at the risk of incurring a "double or nothing" sentence.

At trial objection was made to the proffered testimony of the arresting officer on the grounds that denying an independant verification of the readout on the radar device at the scene of the citation violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial judge then found Petitioner guilty and assessed a fine of $100.00, exactly twice his original penalty. Appeal was then taken to the Fifth Circuit Court in and for Lake County, Florida.

Two years later, Petitioner received the order from the Department of Highway Safety and Motor Vehicles suspending his driving "priviledge" and demanding return of his license. After making inquiry to the Clerk of the court, Petitioner learned on January 14, 1985 that the Circuit Court had affirmed the decision of the County Court without explanation, whereupon this petition was filed to review the order to that effect.

(3) Relief Sought

Petitioner requests that the Court grant certiorari, quash the order entered by the Circuit Court, and direct that his license be restored forthwith, or, in the alternative, that the sentence be reduced to $50.00.

(4) Argument

A. A speeding conviction is invalid under the Sixth Amendment when the digital display of the radar device used by the arresting officer in his decision to cite the defendant is not shown to him at the scene of the arrest.

Few traffic cases have reached the United States Supreme Court on the above issue, and its not likely that one ever will. By their nature, cases involving traffic offenses are not easily susceptible to judicial review, in part because the cost of seeking review far exceed the benefit derived from a successful challenge to the citation. The Circuit Court here declined to expound upon Petitioner's Sixth Amendment claim, giving little to guide this Court in its disposition herein.

The Supreme Court has had occasion, however, to delineate the scope of a police officer's authority when pulling over a motorist in the area of unreasonable searches and seizures. see, discussion of United States v. Ross, Appendix at A11. This case presented to the Circuit Court a similar situation involving the Sixth Amendment right of Confrontation, wherein the Petitioner sought to inspect the radar device at the scene of his citation, in order to help preserve the veracity of the issuing officer's testimony later in the courtroom.

Petitioner submits that the prevalence of the automobile in modern society calls for the imaginative interpretation of the Sixth Amendment here advanced. The Supreme Court has apparently recognized that practicality compels the substitution of officers for judges, where the exigency of the situation at the scene of the arrest creates the need to view the police as the "functional equivalent" of a magistrate. Appendix at A32. Although this pragmatism is normally associated with efforts to expand the power of the police to conduct what would otherwise be an impermissible search, the same principle should apply in favor of the accused to hold the arresting officer to the same limitations that regulate a judge's authority.

In the instant case, practicality demands that Petitioner, and other motorists throughout the state, be afforded the opportunity to verify the testimony of an officer who uses a radar device at the scene of the citation.

Viewing the trooper here at issue as the functional equivalent of a magistrate when he pulled Petitioner over to the side of the road, the question then arises as to whether a judge at this "roadside trial" would be permitted to convict the motorist based upon his own contentions of what the radar device said, when it would have been a simple matter of fixing the readout on the digital display of the radar and showing it to the motorist. Since the officer here declined to do so, his testimony as to the digital readout was the only evidence that Petitioner had exceeded the speed limit, which would place him in the position of being both the judge and the prosecution's sole witness.[1] Because the trooper's testimony was the basis of the conviction, the order of affirmance should be quashed, the conviction reversed and the case dismissed.

B. A sentencing procedure which systematically discriminates against those who plead not guilty by imposing "double or nothing" fines is unconstitutional.

With the crush of litigation facing the courts, the temptation to reward those who plead guilty as part of a negotiated plea, and to punish those who insist on their right to go to trial, is somewhat understandable. That does not, however, make it constitutionally valid. United States v. Jackson 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968); Baker v. United States 412 F. 2d 1069 (5th Cir. 1969); and Weatherington v. State 262 So.2d 724 (Fla. 3rd D.C.A. 1972).

In addition to the treatment Petitioner received as a result of his invokation of the right to plead not guilty and go to trial, he had the opportunity to observe the pattern of sentencing by the traffic court prior to his case coming up for hearing. Appendix at A39. Taken together with the trooper's admonishment that Petitioner's case would be for "double or nothing", an inference can be drawn that these sentencing procedures are widespread. Appendix at A13.

Applying Jackson to the sentence imposed by the Circuit Court, the Second District Court of Appeals reversed, noting the sentencing court's candid admission that the disposition of the case would have been more lenient had the defendant entered a guilty plea. Gillman v. State 373 So. 2d 935, 938 (Fla. 2nd D.C.A. 1979). Consequently, the doubling of Petitioner's fine was

---

1 / Canon 3, subsection C(1)(b) of the American Bar Association's Code of Judicial Conduct (1972) states that a judge should not preside in a proceeding where he (or she) has been a material witness.

clearly improper [illegible]ase:

> The law is clear that any judically imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.

Id.

Similarly, unequal treatment of those who assert their innocence cannot be countenanced in a judicial system that presumes innocence and rightly holds in high esteem an individual's right to trial. Gallucci v. State 371 So. 2d 148, 150 (Fla. 4th D.C.A. 1979). Systematically doubling traffic fines upon pleading not guilty has the effect of imposing "punishment for going to trial" and is unquestionably unconstitutional. Id. Particularly in light of the inherent disuasions to contesting traffic citations, the fine imposed on Petitioner should be reduced accordingly. see, supra at 3.

C. A state statute which unreasonably burdens or restricts a person's right to freedom of travel is unconstitutional.

Petitioner was charged with speeding in excess of 55 miles per hour on the Florida Turnpike under Fla. Stat. §316.183(2), which sets arbitrary limits on the rate of speed all vehicles may travel. The Court may take judicial notice of the fact that the 55-mile-an-hour limit was enacted in response to a shortage of petroleum during the mid-1970s. Today, a worldwide glut in the oil market has made this justification for the speed limit obsolete. This leaves safety as the primary purpose behind the speed limit.

As in the case of Petitioner, automobiles are chosen almost at random by patroling officers who cite offenders irrespective of whether the conditions make the speed at which the vehicle is travelling unsafe. This creates the absurd result that where a motorist exceeds the speed limit to avoid an unsafe traffic situation, he may nonetheless be cited for violating Florida law which obstensibly is designed to promote safety. Appendix at A36-A38. Aside from the potential for abuse of discretion that such an essentially administrative scheme, imposed by peace officers, holds, where a motorist is cited without a showing that his speed is unsafe under the circumstances,[2] imposition of a fine for exceeding an arbitrary speed limit unreasonably restricts the fundamental right of travel guaranteed by the United States Constitution.

2/ In the absence of a fixed speed limit, Fla. Stat. §316.183(1) still prevents driving at a speed greater than is reasonable and prudent under the conditions.

In Shapiro v. Thompson 394 U.S. 618, 89 S.C' 22, 22 L.Ed. 2d 600 (1969) the United States Supreme Court stated that the Court had long recognized that the nature of the Federal Union created by the constitution, and the personal liberty of its citizens requires that freedom of travel be preserved uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. Petitioner's conviction in this case unreasonably restricts his right to travel, calling for a strict scrutiny of the application of the speed limit statute to his movement, and that the least drastic means of enforcing any compelling state interest be utilized. Because there is no showing that Petitioner was driving too fast under the conditions pursuant to section 316.183(1) his conviction should be reversed and the case dismissed.

Respectfully Submitted,

Bret Clark, Petitioner
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was caused to be mailed this 14 day of February, 1985 to: Jeffery M. Pfister, Assistant State Attorney, P.O. Box 1086, 315 W. Main Street, Tavares, FL 32778.

Bret Clark
Attorney at law

File

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

BRET CLARK,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 85-237

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Comes now, the STATE OF FLORIDA, and pursuant to Florida Rule of Appellate Procedure 9.100(h), and this court's order to show cause dated March 12, 1985, and responds to the Petition for Writ of Certiorari.

I. JURISDICTION

Petitioner alleges he does not know when the order sought to be reviewed (A1) was rendered, but admits that his Petition for Writ of Certiorari was filed untimely. Consequently, based upon petitioner's own allegations, the petition should be dismissed. Flinchbaugh v. Burton, 312 So.2d 827 (4th DCA 1975). Petitioner's reliance on the habeas corpus cases to apply for belated review is misplaced, since he is not in custody. Case v. Smith, 10 F.L.W. 632 (1st DCA March 12, 1985). Further, there is no evidence whatever of any state misconduct in improperly notifying petitioner, since it was apparently he who failed to keep the lower court appraised of his current address. See, (A2). Lastly the petition is untimely under any possible interpretation of the notice given petitioner, since it was filed February 14, 1985, which is thirty-one (31) days after petitioner actually received the order sought to be reviewed on January 14.

Respondent respectfully submits no basis for jurisdiction has been demonstrated by petitioner, and the cause should be dismissed.

In the event this court finds jurisdiction of the cause, respondent urges that this petition presents exactly the type of situation where a district court should use its discretion in declining to accept review "to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal". Combs v. State, 436 So.2d 93, 96 (Fla. 1983). The issues presented here could all have been presented to the circuit court, and that court ruled adversely to petitioner. The case presents no issue of such magnitude that certiorari is warranted. Combs.

II. THE MERITS

A. Viewing the digital display.

Petitioner presents three issues for review. The first is that he must be afforded an opportunity to view the radar gun, or the trooper issuing the speeding citation should not be permitted to testify. He presents no authority for this position, other than a patently inapposite discussion of the role of the officers on the scene based on U.S. v. Ross. (No citation given). Whatever the role of officers at the scene, the "neutral Magistrate" in the courtroom is the judge, who can accept or reject the officer's testimony. Sixth Amendment Confrontation Rights pertain to witnesses, not physical evidence, State v. T.L.W., 457 So.2d 566 (2d DCA 1984); the officer was present in court and subject to petitioner's cross-examination. See generally, State v. Johnson, 345 So.2d 1069 (Fla. 1977).

Respondent, further, would take exception to petitioner's allegation that the officer's testimony as to the digital readout was the only evidence of speeding. At least, this cannot be assumed in the absence of a record. The officer was apparently tailing petitioner, (A27), and thus would have his own speedometer reading. Petitioner admits he speeded up. (A 37). He claims it was necessary to speed up to allow the vehicle behind him to pass. (A 37). However, the reasonableness

of petitioner's action would surely be a factual issue for the trial judge sitting as finder of fact. Respondent would also call attention to Section 316.1906(2)(a), Florida Statutes, which provides that the radar evidence is inadmissible unless the trooper "has made an independent visual determination that the vehicle is operating in excess of the applicable speed limit". Thus, it is quite possible the radar evidence was unnecessary. The state would also note that petitioner nowhere suggests that the "lost" radar evidence would have been favorable to him, thus no prejudice is shown. See, James v. State, 453 So.2d 786 (Fla. 1984); State v. Sobel, 363 So.2d 324 (Fla. 1978).

B. Increased Sentence for Going to Trial

Section 318.18, Florida Statutes, provides for standard "offers of settlement" for certain noncriminal traffic infractions. A ticketed driver has the right to "settle" for these civil penalties if he so chooses, in lieu of a fine being determined by a court. However, if a driver wishes to waive this right, he may do so, and the trial judge may set a fine of up to $500.00. § 318.14(5), Fla. Stat. (1984). Thus, even if $100.00 was the traffic court judge's "standard" fine, there is no due process violation. Levitz v. State, 339 So.2d 655 (Fla. 1976).

C. 55 Mile Per Hour Speed Limit is Unconstitutional

A 55 mile per hour speed limit is obviously rationally related to a permissible state purpose, i.e., safety on the highways. Motor vehicles are dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways. Hess v. Pawloski, 274 U.S. 352, 356; 47 S.Ct. 632, 633; 71 L.Ed.2d 1091 (1927).

CONCLUSION

The petition for Writ of Certiorari should not be entertained by this court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ellen D. Phillips

ELLEN D. PHILLIPS
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Petition for Writ of Certiorari has been furnished, by mail, to Bret Clark, at 7630 Biscayne Boulevard, Suite 202, Miami, Florida 33138, this 28th day of March 1985.

Ellen D. Phillips
ELLEN D. PHILLIPS
COUNSEL FOR RESPONDENT

IN THE DI[illegible] COURT OF APPEAL OF T[illegible] ATE OF FLORIDA
FIFTH DISTRICT

Phillips
MKG

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: April 15, 1985

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF CERTIORARI, filed February 14, 1985, is hereby dismissed for lack of jurisdiction.

I hereby certify the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK
By: [signature]
Deputy Clerk

(COURT SEAL)

cc: Bret Clark
Attorney General's Office, Daytona Beach ✓

IN THE [illegible] DISTRICT COURT
OF APPE[illegible]TE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

_____/

MOTION FOR REHEARING

COMES NOW, the petitioner herein, respectfully moving this Court pursuant to Florida Rule of Appellate Procedure 9.330 for rehearing of this Court's order dated April 15, 1985. In support thereof is the following:

This Court entered its order denying the within petition for writ of certiorari for want of jurisdiction. This order was entered prior to the time within which petitioner was to file his reply to the response served by the government on March 28, 1985. The Court therefore overlooked and misapprehended the following points made by the respondent to which petitioner would like to reply:

1. Respondent states at 1 that petitioner has somehow admitted that the petition filed herein was untimely. No such admission was made, and the petition clearly states that he cannot discern from the documents he has received whether the order entered by the circuit court had been filed with the Clerk of the Court. Consequently, petitioner cannot concede the issue of timeliness unless and until this factual question is resolved.

2. Respondent asserts that the petition was filed 31 days after petitioner received the order sought to be reviewed. Respondent has apparently counted the day on which the order was received in computing this time period. Fla.R. App.P. 9.420(e) specifically excludes the day from which the period begins to run, in computing the deadline for documents to be filed or served.

3. Respondent claims that there is no evidence of misconduct in the handling of his case. Petitioner has shown that the clerk of the

lower court violated the notice provisions of Fla. law relating to the suspension of licenses. Had the clerk complied with these notice provisions, petitioner would have been in a position to inquire as to the status of his case prior to the effective date of the suspension, and (assuming that the order at issue has been properly filed), within the time for taking an appeal.

4. Respondent also makes the argument that the issues involved herein do not merit the attention of the Court. Petitioner would like an opportunity to respond to this assertion and the arguments presented by the respondent in full by the filing of a reply under Fla.R.App.P. 9.100(1).

WHEREFORE, and in consideration of the foregoing, petitioner respectfully prays that the court grant a rehearing of the order entered by the court denying the petition for want of jurisdiction.

I DO HERBY CERTIFY that a true and correct copy hereof was caused to be served by mail this 25th day of April, 1985, upon Ellen Phillips, Esquire, Assistant Attorney General, 125 N. Ridgewood Ave., Fourth Floor Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

_____/

RECEIVED
JUL 8 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

MOTION FOR RECALL OF MANDATE
AND SUGGESTION FOR RECONSIDERATION
ON THE COURT'S OWN MOTION

COMES NOW, the petitioner herein, in proper person, respectfully moving this Court pursuant to Fla.R.App.Pro. 9.340 and the inherent power of the Court to recall the mandate, or otherwise set aside the order striking petitioner's motion for rehearing, and to suggest that the Court reconsider the order denying the petition upon its own motion. In support thereof is the following:

The Court in its discretion may withdraw a prior decision and mandate in this cause. Fowler v. State, 443 So.2d 125 (5th DCA 1984). In the interest of justice, petitioner requests that the Court do so herein because the issues raised by the petition have not been fully and fairly litigated, and are of great public importance. In the alternative, petitioner suggests that the Court may rule on the motion for rehearing on the merits by reconsideration of its order denying the petition upon its own motion. Rogers v. State Farm, 390 So.2d 138 (5th DCA 1980).

I DO HEREBY CERTIFY that a true and correct copy hereof has been served by mail this 3rd day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Petitioner
7630 Biscayne Blvd. #202
Miami, FL 33138
(305) 759-2001

A-15

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

BRET CLARK, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. 85-237

RESPONSE TO MOTION FOR RECALL OF
MANDATE AND MOTION FOR ATTORNEYS' FEES

COMES NOW, respondent, the State of Florida, by and through the undersigned counsel, and responds to petitioner's motion to recall mandate by hereby moving for attorney's fees pursuant to Florida Statutes section 57.105. As grounds for this motion, respondent shows:

1. This cause originated when petitioner, as a law student, received a speeding ticket. He contested the speeding ticket, went to trial, and lost.

2. Petitioner's appeal to the circuit court was reviewed on the merits and affirmed without opinion September 4, 1984. (Petitioner's Appendix A-1).

3. Petitioner filed an untimely petition for certiorari to this court February 14, 1985. He moved to proceed as an indigent although he had graduated from law school, and was admitted to the bar in 1984.

4. Respondent was required to expend time and effort responding to petitioner's essentially frivolous issues.

5. The petition was dismissed for lack of jurisdiction.

6. Petitioner's motion for rehearing was striken as untimely.

7. Petitioner has now filed a totally frivolous "Motion to Recall Mandate." The motion is a sham pleading in that:

a). Term of court ended yesterday, thus mandate, if one existed, could not be recalled; and

A-16

b). No mandate ever issued, since the petition was dismissed.

Petitioner's motion demonstrates a startling ignorance of the law, and, more importantly, an unwillingness to expend even minimal effort to research facts or law before taking the time of this counsel and this honorable court. Respondent respectfully urges this court to review the correspondence and pleadings in this cause, which amply demonstrate petitioner's misconception that his law training entitles him to file whatever he wants whenever he wants without the slightest regard for the law or judicial resources. Respondent prays for an order awarding costs and reasonable attorney's fees against petitioner for review of his motion, research, and this response.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ellen D. Phillips

ELLEN D. PHILLIPS
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Bret Clark, pro se, 7630 Biscayne Blvd., Suite 202, Miami, Florida 33138, this 9th day of July, 1985.

Ellen D. Phillips
Of Counsel
Ellen D. Phillips

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Phillips
no. 6

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: July 12, 1985

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION FOR RECALL OF MANDATE AND SUGGESTION FOR RECONSIDERATION ON THE COURT'S OWN MOTION, filed July 8, 1985, is denied. It is further

ORDERED that the Petitioner, Bret Clark, shall file with this Court and show cause, on or before five days from the date hereof, why Respondent's MOTION FOR ATTORNEYS' FEES, filed July 9, 1985, should not be granted.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Bret Clark, (certified mail)
Attorney General's Office, Daytona Beach ✓

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

REPLY TO COMBINED RESPONSE TO
MOTION AND REQUEST FOR
ATTORNEY'S FEES BY RESPONDENT

Petitioner herewith files this reply to respondent's response to petitioner's motion for recall of mandate and for reconsideration of the Court's order dismissing the petition for want of jurisdiction:

The within petition seeks review of a one word decision by the Circuit Court below affirming a finding by the County Court that petitioner was guilty of speeding. Petitioner was not notified of this affirmance until after his license had been suspended, and never received a notice that payment of his fine was past due prior to the order suspending his license. Thereafter, a petition was promptly filed in this Court which was dismissed for want of jurisdiction before petitioner could file a reply to the response thereto. The Court then struck a motion for rehearing as untimely, and petitioner then filed a motion, after corresponding with the Clerk of the Court, and a suggestion that the Court reconsider its order upon its own motion, to which the State responded.

In essence, the response constitutes a personal attack on the petitioner, charging him with incompetence, implying that he had no right to proceed as a pauper and did so wrongfully, stating that the Court and counsel for respondent should not be bothered with having to respond to the issues raised herein and accusing petitioner of engaging in frivolous and unsupportable proceedings for some unstated motive.

As an attorney, petitioner can understand that advocating a position in court may tend to cloud a lawyer's ability to appreciate the maxim that there is always two sides to every dispute, and this in turn may lead counsel to denounce the opposition, rather than focusing on the issue at hand. Thus, during the course of the diatribe against petitioner by respondent, the arguments raised by the document to which the response is obstensibly aimed are left unrebutted. Although respondent complains that petitioner is ignorant of the law and fails to research questions of law or fact before taking up its valuable time (as if the substantial time spent by petitioner on this case is of no consequence), respondent itself fails to cite authority in support of its motion or to make any coherent legal argument. In short, the motion filed by respondent demonstrates a shocking degree of arrogance and lack of professionalism.

In Rogers v. State Farm, 390 So.2d 138 (5th DCA 1980) cited by petitioner, this Court, after striking a petition for rehearing as untimely, decided to reconsider its decision rendered in the case upon its own motion. Respondent studiously avoided mentioning this case, prefering instead to ridicule the alternative argument of "recalling the mandate" made in petitioner's motion. The thrust of both of these arguments is that the Court may, in the exercise of its discretion, set aside a previous ruling in the interest of justice. The response to this argument does not argue a countervailing principle, it simply attacks the credibility of the author.

After nearly three years of litigation on this matter, petitioner has yet to receive a full and fair treatment of the issues raised in this case. If these issues were wholly without merit, as suggested by the respondent, why has it chosen to dispose of the appeal on a technical argument, rather than face the merits of the case? As a member of the bar, petitioner would be ethically bound to refrain from arguing positions that clearly have no other purpose than to harass, and should at the very least be given the benefit of the doubt on this question. Indeed, respondent has not given a lucid explanation of why petitioner would expend so much time and effort over what it apparently feels is a trival matter undeserving of redress in courts the right of access to is a cherished constitutional freedom.

The truth of the matter is, respondent does not feel that traffic citations and proceedings thereon are important enough for legal reasoning or constitutional principles to be brought to bear upon their adjudication.

As a result, traffic courts have become a law unto themselves, with only the quite distant potential that a motorist who was treated unfairly might take it upon himself to seek fairer treatment in the name of principle and the benefit of the many.

Respondent, by its motion, reveals that it has nothing but contempt for a law student who does not simply permit an injustice to run its course, paying an unjust penalty. No matter how small this penalty may seem, the people are entitled to petition the government to protest these injustices, and the desire of respondent to make light of them lends aid to their perpetuity and proliferation, bringing the judicial system into disrepute in the eyes of the public.

Petitioner was such a student, and is now a lawyer, but this latter fact does not mean that he has given up these principles. Many lawyers and aspiring lawyers are criticized in today's society for giving up the nobler missions the job entails for the pursuit of monetary enrichment. This assumption is implicit in respondent's suggestion that because he is a member of the bar, petitioner cannot possibly be a pauper. Again, petitioner is ethically bound to refrain from making such an application before the court if it had no basis in fact, and has not done so in this cause.

Contrary to the belief of respondent, traffic cases are important, and petitioner can attest to the hardship denial of the freedom to travel can have on a person. The issues which have led a long path to this Court are deserving of consideration on the merits, or petitioner would not have pursued them. Accordingly, the motion of respondent should be denied and the order dismissing the petition should be set aside.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail this 11th day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

MKG

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,
Petitioner,
v.
State of Florida,
Respondent.

RECEIVED
JUL 22 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

RESPONSE TO ORDER TO SHOW CAUSE

Petitioner herewith files this response to the Court's order to show cause why the respondent's motion for attorney's fees should not be granted:

1. Petitioner incorporates by reference, as if fully set forth herein, his reply to the subject motion served prior to receipt of the Court's order to show cause.

2. Respondent relies upon Florida Statute 57.105 which provides for the award of attorney's fees where a losing party's position is completely lacking any justicable issue of law or fact. Respondent's motion claims that no support for petitioner's motion requesting that this Court reconsider an order entered by it upon its own motion exists, requiring it to expend time responding to the request. Petitioner relied for this motion on this Court's ruling in Rogers v. State Farm, 390 So2d. 138 (5th DCA 1980). Although respondent did not offer an argument in opposition to this authority, aside from an assault upon petitioner's personal and professional reputation, a justicable issue was presented as to whether the Court should have reconsidered its earlier ruling on its own motion.

3. Respondent asserts that petitioner's issues are "essentially" frivolous, not that there is a complete absence of any justicable issue. Respondent charges that petitioner does not research law or fact before filing papers with the Court, but its motion is itself devoid of any authority or analysis and accordingly should be denied.

4. Article I section 21 of the Florida Constitution provides that the courts of this State shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. The record in the instant cause reveals that petitioner has not been afforded a fair adjudication of the issues raised in this cause. His license was suspended without notice or an opportunity to be heard, in violation of Florida law, and as a result his appeal to this Court was ultimately prejudiced, and now respondent has attempted to compound the procedural unfairness of this result by further denying petitioner meaningful access to the judicial process. The policy of the statute upon which respondent relies is not to cast a chilling effect on the use of the courts. Stevenson v. Rutherford, 440 So2d 28, 29 (4th DCA 1983).

5. Because statutes, such as the one at issue here, are in derogation of the common law where they provide for the award of attorney's fees, they must be strickly construed. Whitten v. Progressive Cas. Ins. Co., 410 So2d 501, 505 (Fla. 1982). In light of the Rogers case cited supra, and the perfectly reasonable argument that the Court would not dispose of a case on a highly technical ground which would deny justice to a litigant by placing form over substance, this Court cannot conclude that a suggestion that it reconsider a ruling on its own motion for this reason is so clearly devoid of merit as to be completely untenable. Id., quoting Allen v. Estate of Dutton 384 So2d 171 (Fla 5th DCA 1980). Although the judiciary has undergone criticism from the press and public for a perceived denial of justice on the grounds of "legal technicalities", petitioner would argue that he at least has the right to present the argument that denying his petition for such technical reasons should not be permitted without fear of retaliation from opposing counsel through assessment of attorney's fees.

6. Finally, petitioner should not be punished simply because he has not been successful in his case. A frivolous appeal, properly so called, is one so manifestly untenable on a bare inspection of the record and issues presented that its character may be determined "without argument or research." Id., quoting Treat v. State ex rel. Mitten, 121 Fla. 509, 510-11, 163 So. 883, 883-84 (1935). By its own admission, respondent has obstensibly researched the issue the lack of which it now claims attorney's fees for.

Respondent cannot have it both ways. If the issue presented by petitioner's motion was so far-fetched as to be untenable, then it could have simply not responded to it and it would fall of its own insufficeicency. Indeed, this fact shows that respondent's motion has no merit. The intent of the statute is to prevent frivolous lawsuits to which a party is required to respond at his peril, or a meritless appeal taken for the purposes of delay, to which an appellee is likewise obligated to respond. In fact, a literal interpretation of the statute would hold it applicable to a "civil action", not to a motion an adversary finds objectionable. As pointed out in the reply previously filed by petitioner, there is no intimation of what purpose is to be served by filing the motion here complained of if not for a good faith belief in its merit by petitioner.

In conclusion, petitioner cannot overemphasize the serious nature of the charges made by respondent in its motion. He is accused of ignorance of the law, an uncaring attitude for the uses to which the courts are put and abuse of the right to proceed as an indigent. In the course of its advocacy, respondent has lost sight of the proper functioning of the judiciary when considered as a whole, as opposed to the mechanical application of procedures. The thrust of petitioner's motion was to have this case heard on the merits, whether the decision thereon was favorable or not. He should not be punished for the belief that this Court might grant him such a right.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail this 17th day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

IN THE DISTRIC' COURT OF APPEAL OF THE F"TE OF FLORIDA
FIFTH DISTRICT

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

RECEIVED
JUL 26 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

DATE: July 25, 1985

BY ORDER OF THE COURT:

Petitioner's July 17, 1985, Response To Order To Show Cause having been noted, it is

ORDERED that Respondent's MOTION FOR ATTORNEYS' FEES, filed July 9, 1985, is granted. Accordingly, pursuant to Florida Rule of Appellate Procedure 9.400(b) attorney's fees in the amount of $100.00 are hereby assessed against the Petitioner for this appellate proceeding for which let execution lie.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach
Bret Clark, Esq.

A-25

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

BRET CLARK,

Petitioner,

v. MOTION TO REVIEW ORDER GRANTING ATTORNEY'S FEES

STATE OF FLORIDA,

Respondent.

Petitioner, in proper person, and pursuant to Florida Rule of Appellate Procedure 9.400(c), moves this Court for review of its order granting Respondent's Motion for Attorney's fees entered July 25, 1985. In support thereof is the following:

1. Respondent moved for attorney's fees, under Florida Statute Section 57.105, relying upon a personal attack upon the credibility of Petitioner, urging the Court to "review the correspondence and pleadings in this cause" so that the Court could punish Petitioner for filing "whatever he wants whenever he wants without the slightest regard for the law or judicial resources." Needless to say, this hardly constitutes a legal argument that the issues presented by Petitioner were so lacking in merit that the Court should assess attorney's fees.

2. Apparently the Respondent was referring to correspondence between Petitioner and the Clerk of the Court culminating in a letter from the Clerk dated June 17, 1985, a copy of which is attached hereto, in which Petitioner was invited to pursue his complaints as to the handling of his case "by submitting a proper pleading to the Court." In response to this invitation Petitioner filed the motion for which he was assessed attorney's fees.

3. The substance of the correspondence between the Petitioner and the Clerk of this Court was a complaint by the undersigned that he had not been treated fairly by the Court in the disposition of these

A-26

proceedings. ...eed, the basis for the Mot' for Reh... ng filed by Petitioner was a specific criticism of this Court, in that it had violated the Rules of Appellate Procedure by ruling on the Petition filed herein before the undersigned had an opportunity to file his reply to the response filed by the State in accordance with Rule 9.100(i).

4. Petitioner respectfully argues that the assessment of attorney's fees against him was not predicated on an absence of any justicable issue of law or fact, but, rather, fees were assessed in retaliation for his criticisms of the Court and his attempts to seek redress for these grievances by writing letters and filing papers."(1)

5. Fundamental to a schene of ordered liberty is the notion that an individual has the right to petition the government for redress of his grievances, a right guaranteed by the First Amendment to the United States Constitution, as applied to the State of Florida through the Due Process Clause of the Fourteenth Amendment. Since this Court, as an entity organized under the laws of this State as a part thereof, and as an entity duty bound to enforce the Constitution of the United States, has entered an order which deprives Petitioner of the right to petition the government for redress of grievances and the Due Process of law through its assessment of attorney's fees, Petitioner respectfully argues that Florida Statute Section 57.105 is invalid as being repugnant to the Constitution and laws of the United States of America.

WHEREFORE, and in consideration of the foregoing, Petitioner prays that the Court grant the within Motion to Review the Order Granting Attorney's Fees, vacate its earlier order granting fees, and/or certify the issues raised to be of great public importance.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 21st day of August, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
Proceeding Pro Se
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

A-27

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

(1) Phillips

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: September 12, 1985

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION TO REVIEW ORDER GRANTING ATTORNEY'S FEES, filed August 23, 1985, is denied.

RECEIVED
SEP 18 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

I hereby certify the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK
By: Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach
Bret Clark, Esq.

A-28